

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GARY MINNIS, LARRY MORE, DAVID)
RICHARDSON, RONALD ROMAN,)
DELONTE TINSLEY, AND WOLFJUNGE)
WOLFSBURGER, on behalf of themselves and)
all others similarly situate,)

Plaintiffs,)

v.)

GENE JOHNSON, Director, et al.,)

Defendants.)

JURY DEMANDED

Civil Action No. 1:10cv96

**DEFENDANT TONEY, WATSON AND STEWART'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE**

The Defendants, Ronald W. Toney, K. Watson, and C. Stewart (hereinafter "Defendants"), by counsel, state the following in opposition to Plaintiffs' Motion to Strike:

The Plaintiffs' have moved to strike, or in the alternative to file a sur-reply to, Defendants' Rebuttal to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss.¹ Plaintiffs' contend that Defendants have raised a new defense, i.e. that they are not liable under the Americans with Disabilities Act and Rehabilitation Act because they are not government employees, for the first time in their reply. Plaintiffs' argue that this defense contradicts the Defendants' "own Answers and Motions."²

In their Motion to Strike, Plaintiffs' correctly point out that these Defendants admitted in their Answer to Plaintiffs' Complaint and Amended Complaint that they worked in the medical

¹ See D.E. nos. 75 & 77. These Defendants have responded to Plaintiffs' Motion for Leave to File a Sur-Reply in a separate pleading filed contemporaneously with this memorandum in opposition.

² Id. at p. 5.

unit at Powhatan Correctional Center.³ Unfortunately, Plaintiffs neglect to recognize that Defendants Toney, Watson and Stewart denied in their Answer to Plaintiffs' Complaint as well as their Answer to Plaintiffs' Amended Complaint that they were not state employees.⁴ Notwithstanding this overt denial, pleadings filed by Johnson, Schilling, Hulbert, Washington, Fegan, Camache, Taylor, Reese, Guillory, McFarlane, Trimmer, Pearson, Hunnel, Parker, Morris, Virginia Department of Corrections, Community Corrections, Virginia Correctional Enterprises, Virginia Department of Correctional Education, and Powhatan Correctional Center (hereinafter collectively "Commonwealth Defendants") also indicated in their Brief in Support of Motion to Dismiss Amended Complaint that these Defendants are NOT Virginia Department of Corrections employees.⁵

Further, these Defendants are represented by separate counsel from the Commonwealth Defendants. The fact that these Defendants were not employees of the Virginia Department of Corrections was not hidden from the Plaintiffs and therefore the Plaintiffs' allegation that Toney, Watson and Stewart are introducing new facts or different legal arguments in the reply brief is without merit and the court should deny their Motion to Strike.⁶

Plaintiffs' further allege that these Defendants should be barred from asserting this new defense because they have asserted the defense of qualified immunity. These Defendants asserted this defense in response to Plaintiffs' specific allegations, i.e. that these Defendants are being sued in their "official and individual capacities", i.e. as government officials.⁷ Throughout Defendants' Motion to Dismiss, the Defendants maintained that the Americans with Disabilities

³ See Defendant Toney, Watson, and Stewart's Answer to Plaintiffs' Complaint, D.E. 27, ¶ 39, 40, and Answer to First Amended Complaint, D.E. 27, ¶¶ 43, 44, 45.

⁴ D.E. nos. 27 & 38, ¶ 2. Plaintiffs' complaint alleges that "the individual named defendants are state agency defendants' employees sued in their official and individual capacities ("named defendants")."

⁵ D.E. no. 46, ¶ 46. .

⁶ Also, counsel for Defendants Toney, Watson, and Stewart identified herself as "counsel for PHS employees" at the Rule 26(f) conference held on April 26, 2010.

⁷ D.E. no. 34, ¶ 2.

Act (hereinafter “ADA”) as well as the Rehabilitation Act do not apply to individual defendants such as Defendants Toney, Watson and Stewart. With respect to qualified immunity, the Defendants argue in the alternative that should the court take as true Plaintiffs’ assertion that these Defendants are government officials, whether factually accurate or not, they are entitled to qualified immunity. Simply pleading an alternative defense to Plaintiffs’ claims neither changes the status of these Defendants as employees of a private corporation nor does it waive these Defendants’ defense that they are not subject to liability under the ADA or the Rehabilitation Act because they are not Virginia Department of Corrections employees.

In the alternative, these Defendants Rebuttal should not be stricken because the Plaintiffs’ will suffered no prejudice by allowing it to stand. Assuming, *arguendo*, that the Plaintiffs’ arguments are well-founded, these Defendants do not oppose the filing of a sur-reply by Plaintiffs. Therefore, Plaintiffs’ will have had the opportunity to respond to this allegedly “new” evidence.

Plaintiffs’ final argument is that Defendants’ claims are inappropriate for a motion to dismiss. The fact remains that these Defendants are employees of a private contractor and not the Virginia Department of Corrections, a fact which could have been discovery prior to Plaintiffs’ filing of their Amended Complaint by the most cursory investigation. A complaint containing allegations unsupported by any information obtained prior to filing, or allegations based on information which minimal factual inquiry would disprove, will subject the author to sanctions.” In Re Kunstler, 914 F. 2d 505, 516 (4th Cir. 1990)(See also, Segen v. Buchanan General Hospital, Inc., 552 F. Supp. 2d 579 (W.D. Va. 2007). Accordingly, Plaintiffs’ Motion to Strike should be denied.

Accordingly, Defendants Toney, Watson and Steward respectfully request that the court deny the Plaintiffs’ Motion to Strike for the aforementioned reasons.

Certificate of Service

I hereby certify that on the 7th day of June, 2010, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will then send a notification of such filing (NEF) to the following:

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